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In the

Supreme Court of the United States

OCTOBER TERM, 1950

No. 708

LEON MOBLEY AND ASSOCIATED INDEMNITY CORPORATION,
Petitioners,

v.

BETHLEHEM SUPPLY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Leon Mobley and Associated Indemnity Corporation, a corporation, respectfully pray for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review a decision of that court heretofore rendered, affirming a judgment of the trial court. Your petitioners respectfully submit that such court refused to follow and apply the local law of the State of Texas as determined by the Appellate Courts

of that State and likewise refused to follow and apply the well established and substantive law of the Federal Appellate Courts to the facts involved in this case and the questions presented for review, and such court's decision is in conflict with and opposed to the decisions of the Appellate Courts of the State of Texas and of the Federal Appellate Courts on the questions involved; such claims were presented by petitioners' petition for rehearing which was overruled without opinion on January 30, 1951.

SUMMARY STATEMENT OF MATTERS INVOLVED

This suit was filed originally in the District Court of the United States for the Western District of Texas by one of the petitioners, Leon Mobley, who will hereafter be referred to as plaintiff. The plaintiff's suit was one for damages on account of personal injuries received by him while working for the Western Drilling Company in Ector County, Texas. The injuries were sustained on or about the 31st day of January, 1946.

A short time before plaintiff was hurt, his employer, Western Drilling Company, had purchased a drilling rig from the respondent herein, Bethlehem Supply Company, who will be referred to hereinafter as defendant. In connection with, and as a part of, this sale by the defendant, it undertook and agreed to have one of its representatives assist, direct and show Western Drilling Company how to rig up the drilling rig and how to operate it and to aid and assist in that operation. (R. pp. 146-148.) This employee of the defendant was at all times subject to the orders of and under the direction and control of the defendant. (R.

pp. 148-149.) The defendant paid his salary and at no time was their employee subject to the direction and control of anyone else.

On the date of plaintiff's injury Mr. Brieth, in the course of his employment for the defendant and acting at the instance of the defendant, was directing, showing and assisting Western Drilling Company how to rig up and operate the drilling rig that defendant had sold to Western Drilling Company. It was discovered that the low-gear clutch of the drilling rig was hard to engage. The plaintiff was instructed to grease the clutch. It became necessary for Mr. Mobley to go inside the rig to do this. He went on the inside of the rig and while attempting to grease the low-gear clutch, defendant's employee, Brieth, engaged the clutch which resulted in plaintiff receiving injuries, totally and permanently disabling him.

On or about July 8, 1948, the plaintiff brought this suit against defendant seeking to recover damages on account of its negligence. The negligence relied upon was that defendant's employee engaged the low-gear clutch of the rig while plaintiff was attempting to grease it and the failure of defendant's employee to keep a proper lookout for the plaintiff, at the time and on the occasion in question.

One of the Petitioners, Associated Indemnity Corporation, intervened in this suit on July 28, 1948, setting up that at the time plaintiff received his injuries it carried a workmen's compensation insurance policy covering the employees of Western Drilling Company; that it had made certain payments to plaintiff and incurred hospital and

medical expenses and was entitled to be subrogated in the amounts which it had expended and might thereafter expend to anything that plaintiff might recover against the defendant.

The defendant filed a Motion to Dismiss plaintiff's petition and the Plea of Intervention of Associated Indemnity Corporation. (For convenience the Associated Indemnity Corporation will be referred to herein as Intervenor.) The ground of the motion was that plaintiff's petition and the Plea of Intervention were both filed after the expiration of two years from the date of plaintiff's injury and that by reason of this the cause of action was barred by the Texas Statutes of Limitations, to-wit, Article 5526, Subdivision 6, Vernon's Civil Statutes of the State of Texas Annotated.

The Motion to Dismiss was opposed by plaintiff and intervenor. The plaintiff in answer to the Motion to Dismiss set up that at the time he filed his suit, he still had a claim pending and on file for workmen's compensation before and with the Industrial Accident Board of the State of Texas; that this claim was filed on or about April 30, 1946, and was still pending and undisposed of by the Industrial Accident Board. That in June of 1948, and while plaintiff's claim was still undetermined and pending before the Industrial Accident Board, he agreed with the Intervenor that he might file this suit and that Associated Indemnity Corporation would intervene in said suit and assert its subrogation rights as provided by law; that since the suit was filed within two years after making such

agreement and at a time when his claim was still undisposed of and pending before the Industrial Accident Board that the limitation Statute relied upon by Respondent did not bar his cause of action.

On the 20th day of September A. D., 1948, the trial court heard defendant's Motion to Dismiss and after the hearing thereof, entered an order overruling it. Thereupon, the defendant filed its Answer to the merits of the case.

This case came on for trial on its merits September 20, 1949, and was tried to a jury. At the conclusion of the evidence the case was argued and the Court then delivered its charge to the jury. Numerous exceptions were taken to the Court's charge by plaintiff and the Intervenor. The objections to the charge were overruled and the jury retired to consider the case. This case was submitted under a general charge and the jury returned a verdict for the defendant.

The plaintiff and the Intervenor in due time filed a Motion for New Trial which was overruled. Thereafter, and within the time prescribed by law, Petitioners gave notice of appeal. Appeal bonds were duly given. The defendant, Bethlehem Supply Company, also gave notice of appeal and has appealed from that part of the judgment which was contrary to its contention with respect to plaintiff's cause of action being barred by the two-years statute of limitation.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court. Thereafter

and in due time Petitioners filed their Motion for Rehearing which was overruled by the court without an opinion. The opinion of the court affirming the judgment of the trial court has not yet been published.

The questions here involved and the manner in which they are raised are as follows:

(a) The error of the trial court in instructing the jury to return a verdict for the defendant if it found from a preponderance of the evidence that plaintiff sustained his injuries by reason of any mechanical defect in the drilling rig. This error is raised by objection to that portion of the Court's charge submitting that question to the jury. (R. p. 222.) This error was also raised in the Motion for New Trial. (Par. 1, R. pp. 229-230.)

This error was also specified in the Circuit Court of Appeals and the court's action in failing to sustain it was assigned as error in Petitioner's Motion for Rehearing.

(b) The error of the Court in charging the jury to return a verdict for the defendant if it found that Respondent's employee, Brieth, had no authority from the defendant to manipulate or operate the draw works of the drilling rig. This error is raised by objection to that portion of the Court's charge submitting that question to the jury. (R. pp. 221-222.) This error was also urged in Motion for New Trial. (Par. 2, R. pp. 230-232.)

This error was also specified in the Circuit Court of Appeals and the court's action in failing to sustain it was assigned as error in Petitioner's Motion for Rehearing.

(c) The error of the Court in charging the jury that, unless they found that Brieth set in motion the drum of the draw works, to return a verdict for the defendant. This error is raised by objection to that portion of the Court's charge. (R. p. 223.) This error was also raised in Motion for New Trial. (Par. 3, R. pp. 232-233.)

This error was also specified in the Circuit Court of Appeals and the court's action in failing to sustain it was assigned as error in Petitioner's Motion for Rehearing.

(d) The question as to whether there is any evidence of probative force to support the verdict of the jury in this case. This was raised in Motion for New Trial. (Par. 4, R. p. 234.)

This error was also specified in the Circuit Court of Appeals and the court's action in failing to sustain it was assigned as error in Petitioner's Motion for Rehearing.

(e) The question as to whether the verdict of the jury in this case is against the great weight and preponderance of the evidence and so opposed to substantial justice and so shocking to good conscience that it ought not to stand. This question was raised in Motion for New Trial. (Par. 5, R. pp. 234-235.)

This error was also specified in the Circuit Court of Appeals and the court's action in failing to sustain it was assigned as error in Petitioner's Motion for Rehearing.

(f) The error of the Court in submitting to the jury the question of unavoidable accident. This was raised in Motion for New Trial. (Pars. 5 and 6, R. pp. 235-236.)

This error was also specified in the Circuit Court of Appeals and the court's action in failing to sustain it was assigned as error in Petitioner's Motion for Rehearing.

(g) The question of whether or not plaintiff's cause of action was barred by the Texas two-year Statute of Limitation. This question was raised by defendant, as set out in its brief.

This error was also specified in the Circuit Court of Appeals and the court's action in failing to sustain it was assigned as error in Petitioner's Motion for Rehearing.

STATEMENT OF THE BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, U. S. C. A., Section 1254(1) and amendments thereto as enacted by Public Law 773, 80 Cong. 2nd Session.

Petitioner's petition for rehearing which is the basis for this petition was denied by the court on January 30, 1951 without an opinion. This petition for certiorari was filed within the time prescribed by law.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

In affirming this case, the United States Court of Appeals for the Fifth Circuit refused to follow the applicable local decisions on the questions here presented; the decision in this case, involving important question of local law, is in conflict with local law as well as the applicable Federal Decisions, and has decided an important question

of general law in a way untenable and in conflict with the weight of authority, and has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

The errors urged are set forth in the Appendix to this petition and made a part hereof. The trial court in his charge to the jury submitted as a defensive issue, and as a way of escape for defendant, the question as to whether plaintiff's injuries were the result of some mechanical defect in the drilling unit when there was neither any pleading or evidence to support such defensive issue and over the objection of Petitioners. The Court further submitted as a defensive issue and as a way of escape for the defendant the question as to whether defendant's representative Brieth had any authority to manipulate or operate the drawworks of the drilling rig over the objection that the undisputed evidence in this case showed that he did have such authority. The trial court further in his charge to the jury instructed it that unless Brieth, the representative of the defendant, set in motion the drum of the drawworks, then it should return a verdict for the defendant, over objections timely made by Petitioners that this instruction was in conflict with the issue of defendant's failure to keep a lookout.

Since all the questions are presented in detail in the supporting brief attached hereto, we do not here elaborate.

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue in this case to the United States Circuit Court of Appeals, for the Fifth Circuit and upon hearing

by this Honorable Court the judgment of said United States Circuit Court of Appeals for the Fifth Circuit be reversed; and that Petitioners have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

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APPENDIX

SPECIFICATIONS OF ERROR

The following errors were assigned in the Circuit Court of Appeals on the original presentation of this cause to that court and in its Motion for Rehearing and are made a part of this petition:

—1—

This Honorable Court erred in overruling Appellants' Specification of Error No. 1, reading as follows:

> **"The error of the Trial Court in giving the jury the following instruction:**
>
> > **" 'You are further instructed that if you find and believe from a fair preponderance of the evidence that the plaintiff received his injuries about which he now makes complaint, as a result of some mechanical defect in said drilling unit, or from the lack of grease on any part of said drilling unit, and not from the act of defendant or its plaintiff's injuries, or immediately prior thereto then in such event your verdict should be for the defendant'."**

—2—

This Honorable Court erred in overruling Appellants' Specification of Error No. 2, reading as follows:

> **"The error of the Trial Court in giving the jury the following instruction:**
>
> > **" 'Further, if you find and believe from a preponderance of the evidence that the operation of the draw works of the drilling unit involved was, at the time the plaintiff claims to have received his injuries, under the sole and exclusive charge of the Western Drilling Company and its representatives, and that defendant's representative Brieth had no authority from the defendant to manipulate or operate said draw works, then in**

such events your verdict should be for the defendant'."

—3—

This Honorable Court erred in overruling Appellant's Specification of Error No. 3, reading as follows:

"The error of the Trial Court in giving the jury the following instruction:

" 'You are instructed that unless you find from a preponderance of the evidence that defendant's representative Brieth, while acting in the scope of his authority, negligently set in motion the drum of the draw works on the drilling unit involved, while the plaintiff was inside the encasement thereof, in a place of danger, your verdict will be for the defendant'."

—4—

This Honorable Court erred in overruling Appellant's Specification of Error No. 4, reading as follows:

"The error of the Trial Court in holding that there was any evidence of probative force to support a verdict for defendant."

—5—

This Honorable Court erred in overruling Appellant's Specification of Error No. 5, reading as follows:

"The error of the Trial Court in failing to set the verdict of the jury aside on the ground that it was against the great weight and preponderance of the evidence and so opposed to substantial justice and so shocking to good conscience that the Court ought not to permit it to stand."

—6—

This Honorable Court erred in overruling Appellant's Specification of Error No. 6, reading as follows:

"The error of the Trial Court in submitting to the jury the issue of unavoidable accident."

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was rendered on January 5, 1951. It is not yet reported but may be found at page ..... of the printed record.

JURISDICTION

A statement of the basis of the jurisdiction of this Court is contained in the Petition, and in the interest of brevity is not repeated here.

STATEMENT OF THE CASE

The essential facts of the case are stated in the Petition, and in the interest of brevity are not repeated here.

SPECIFICATIONS OF ERROR

The errors to be urged are set forth in the appendix of the Petition and in the interest of brevity are not repeated here.

SPECIFICATIONS AND ARGUMENT IN SUPPORT THEREOF

SPECIFICATION OF ERROR I—(Restated)

This Honorable Court erred in overruling Appellant's Specification of Error No. 1, reading as follows:

> **"The error of the Trial Court in giving the jury the following instruction:**
>
> > **" 'You are further instructed that if you find and believe from a fair preponderance of the evidence that the plaintiff received his injuries about which he now makes complaint, as a result of some mechanical defect in said drilling unit, or from the lack of grease on any part of said drilling unit, and not from the act of defendant or its plaintiff's injured or immediately prior thereto then in such event your verdict should be for the defendant'."**

Statement under Specification of Error I

Specification of Error I, which we have restated immediately above, sets out that part of the court's charge to the jury with reference to some mechanical defect in the drilling rig being the cause of plaintiff's injury. This Court will note that the charge told the jury that if the plaintiff received his injury due to some mechanical defect in the drilling rig that it would return a verdict for the defendant. This part of the Court's charge was excepted to on

the ground that there was no evidence to support the theory that the plaintiff received his injury due to some mechanical defect in the drilling rig. (R. p. 222.)

In our motion for a new trial we again called this error in the trial court's charge to his attention and urged it as a ground for new trial. (R. pp. 229-230.)

The United States Court of Appeals for the Fifth Circuit overruled this point and its action in so doing was assigned as error in the Motion for Rehearing.

Authorities and Argument

It was error for the trial court to tell the jury that if it found plaintiff's injury was received from some mechanical defect in the drilling unit to return a verdict for the defendant. The reason that such an instruction was error is that there was no evidence to support that theory. All the evidence in this case was that there was no mechanical defect in the drilling unit.

Mr. Brieth, an employee of the defendant was the only witness who testified with reference to whether there was any mechanical defect in the drilling rig. This witness testified that there was no mechanical defect in the rig. (R. pp. 189-190.)

Under this state of the record it was reversible error for the court to tell the jury that if the plaintiff was injured by reason of some defect in the drilling unit to return a verdict for the defendant. The reason that such a charge constituted reversible error is that under the law of Texas

giving an instruction which is without support in the evidence is reversible error.

The court's charge in this case must be tested by the law of Texas. *Erie Railway Company v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.*

In support of our contention that giving the instruction here under consideration constituted reversible error we cite the case of *Payne, Agent v. Harris, 241 S. W. 1008, 1011.* There the court said:

> "(5-7) It is urged that the court erred in submitting certain matters to the jury which plaintiff in error contends were not raised by the evidence. In view of another trial it is unnecessary for us to decide whether there was evidence on which to base those portions of the charge or not. It is elementary, of course, that an issue on which there is no evidence should not be embodied in the charge. Where several issues are presented, some of which are raised by the evidence and some of which are not, if they are material, and the jury returns a verdict that might be based on a portion of the charge unsupported by the evidence, it is error, because it is impossible to know where the verdict is based on a portion for which there was no support in the evidence."

The case from which we have just quoted was rendered by the Commission of Appeals of the State of Texas, and the Supreme Court approved the holding of the Commission of Appeals on the questions discussed therein.

There being no evidence in this case that the plaintiff sustained his injury by reason of any mechanical defect in the drilling rig, if the jury returned a verdict in this case based on that portion of the court's charge, then its

verdict in this case was unsupported by the evidence. Since this case was submitted to the jury under a general charge it is impossible to know whether the verdict it rendered is based on that portion of the charge for which there is no support in the evidence. We say this case is directly in point and requires that this case be reversed and remanded.

The case of *Gulf, C. & S. F. Railway Company v. Helms Brothers, 211 S. W. 597*, by the Austin Court of Civil Appeals, supports the point we here urge. There the court said:

> "It is error to submit an issue which finds no basis in the evidence * * *."

We call the Court's attention to the case of *Texas Electric Railway Company v. Crump, 212 S. W. 2d 827, 828*, by the Austin Court of Civil Appeals. There the court said:

> "* * * We agree with the appellant that it is error for the trial court to submit to the jury an issue which is not supported by competent evidence."

The last Texas case that we quote from is that of *Missouri, K. & T. Ry. Co. of Texas v. Harrison, 99 S. W. 124, 125*. There the court said:

> "Two grounds of recovery were alleged and submitted in the charge to the jury; first, the negligence of appellant in failing to provide passengers a reasonably safe approach to its trains at Myra; and, second, the negligence of the train operatives in this instance in failing to discover that Mrs. Parker was in danger of being struck in time to avoid the collision. That the second issue was not raised by the evidence is perfectly clear, we think, from the testimony of Mrs. Parker herself, quoted above, which was corroborated by ap-

> pellee and the other witnesses. That it is reversible error in this state to submit such an issue not raised by the evidence is equally clear."

There are numerous other cases in Texas supporting the point here urged. They are collated in *36 Texas Digest 508, Key 252(1) Trial.* We have searched diligently and find no Texas case contrary to those from which we have quoted.

While, as before stated, the question here involved is controlled by Texas law, we found no Federal case to the contrary. The case of *Fleming v. Husted, 164 Federal 2d 65, 69, Circuit Court of Appeals, Eighth Circuit,* declares the law as follows:

> "* * * Of course, instructions may not in their language leave the way open to the jury to consider some question urged, suggested or mentioned on the trial, which is not an issue or is not supported by the evidence. Cf. Citizens Gas & Electric Co. v. Nicholson, 8 Cir., 152 F. 389, 392, 393."

In the interest of brevity, we refrain from citing a long list of Federal cases as it seems to be well established in the Federal Courts as it is in the Courts of Texas that it is a reversible error to submit to a jury for its determination a question that is not raised by the evidence.

We respectfully say that there was no evidence in this case that plaintiff received his injuries because of some mechanical defect in the drilling unit, and the court's charge to the jury authorizing it and directing it to find for the defendant if the injuries were caused by some mechanical defect in the machinery was error for which that court should have granted a new trial and for which the

United States Court of Appeals for the Fifth Circuit should have granted a new trial.

The United States Court of Appeals in its opinion dealing with this specification said:

> "The portions of it with which these specifications deal were necessary to a full presentation. They were properly given."

We fail to see where there was any justification for telling the jury expressly to return a verdict for the defendant if plaintiff's injuries were due to some mechanical defect in the drilling rig when the undisputed evidence was that no mechanical defect existed in it. We insist that such a charge was error, improperly given, and that the United States Court of Appeals for the Fifth Circuit erred in holding to the contrary. Its holding is in direct conflict with the cases herein cited.

The United States Circuit Court of Appeals further on this Specification of Error brushed it aside, saying that it was justified and necessary to the end that the court confine the jury's consideration to the complaint made against Brieth and in doing so advise the jury that if any condition other than the one for which Brieth was responsible was found to be the cause of injury, the defendant would not be liable. We say that this part of the court's charge goes far beyond what the United States Court of Appeals for the Fifth Circuit admits; this part of the court's charge was not negative in nature but positive; it expressly told the jury to return a verdict for the defendant if plaintiff was injured by reason of some mechanical

defect in the machinery in face of the undisputed evidence that there was no mechanical defect in it.

SPECIFICATION OF ERROR II—(Restated)

This Honorable Court erred in overruling Appellants' Specification of Error No. 2, reading as follows:

> **"The error of the Trial Court in giving the jury the following instruction:**
>
> > **" 'Further, if you find and believe from a preponderance of the evidence that the operation of the draw works of the drilling unit involved was, at the time the plaintiff claims to have received his injuries, under the sole and exclusive charge of the Western Drilling Company and its representatives, and that defendant's representative Brieth had no authority from the defendant to manipulate or operate said draw works, then in such events your verdict should be for the defendant'."**

Statement under Specification of Error II

Specification of Error II immediately above shows that the Court charged and directed the jury to return a verdict for the defendant in this case, if they found that its representative Brieth had no authority from the defendant to manipulate or operate the draw works of the drilling rig. This portion of the Court's charge was objected to on the ground that there was no evidence in the case to support any such defensive theory. (R. pp. 221, 222.) This error was again urged in the motion for new trial, pages 230, 231.

This Specification of Error was urged on original presentation of this case in the United States Court of Appeals

for the Fifth Circuit and in Motion for Rehearing in that court.

That defendant's employee Brieth had authority to manipulate the draw works of the drilling rig was undisputed. He was the only witness who testified on that point and he said that he was an employee of the defendant and that his duties consisted of the servicing and care of Bethlehem manufactured equipment; that he was on a salary with the defendant and that his superior had sent him out to this rig where plaintiff was injured to give whatever advice or help he could in the way of seeing that the machinery was started properly. (R. pp. 146-147.)

This witness further testified that it was the defendant that ordered him out there and told him what to do. He testified, expressly that he had authority and the right to test the machine out. (R. pp. 191-192.)

There was no evidence in this case that defendant's employee, Brieth, was without authority to engage and disengage the clutch of the drilling rig which the defendant had sold to Western Drilling Company. It is uncontradicted that he did have such authority and we find no evidence in this record to the contrary.

Authorities and Argument

The cases which we have cited and quoted from in support of our Specification of Error I are equally applicable here. In the interest of brevity we do not re-quote from those cases. Specification of Error II involves the same vice as is involved in Specification of Error I; that is, it

is reversible error for the Court to submit to the jury an issue that is without any support in the evidence.

In this case the Court told the jury that if Mr. Brieth was without authority to manipulate the draw works then they should find for the defendant. This case was submitted on a general charge. Who can say that the jury did not find for the defendant on the ground, or on the theory, that Brieth was without authority to manipulate the draw works? The trial judge told the jury that they might do so.

The trial court committed reversible error in giving that portion of the charge here under discussion over objection duly made thereto, and the verdict of the jury and the judgment rendered thereon should be set aside and a new trial granted.

Likewise, the Honorable United States Court of Appeals for the Fifth Circuit committed reversible error in failing to sustain this Specification of Error.

The Court, in its opinion, says that Respondent had pleadings and was entitled to have submitted the issue as to whether or not Brieth had become the loaned or special employee of Western Drilling Company. We argue that the evidence in this case did not raise that issue. It is significant that the United States Court of Appeals for the Fifth Circuit fails to point to any testimony in the record that suggests any such issue. On the other hand, we have pointed to the record the only testimony that was given and it affirmatively shows that Brieth was not a loaned or special employee of Western Drilling Company.

The United States Court of Appeals in its opinion also says that if Brieth was not a loaned servant but was meddling with or trying to operate the draw works out of mere personal curiosity on his part and not for the purpose of carrying out the business of Bethlehem, Bethlehem would not be liable. That Court further says that this was an issue of fact for the jury's determination. This astounding statement is wholly without any support in the record. We have pointed to the testimony in the record that what Bethlehem had Brieth employed to do was to manipulate and operate the draw works among other things, test it so to speak, to the end that it would be set up so as to operate properly. It is surmise and speculation for the Honorable Chief Justice of the United States Court of Appeals for the Fifth Circuit, in our opinion, to go so far as to say that there was a jury issue in this case as to whether or not the employee of Bethlehem was manipulating or operating the draw works out of mere personal curiosity. The undisputed record shows that the clutch was not functioning properly and Brieth himself was attempting to correct this thing; that was certainly not mere personal curiosity on his part but was for the purpose of carrying out the business of the defendant and in the discharge of his duty to his employer.

The United States Court of Appeals in its opinion further says that plaintiff's theory that whatever Brieth did out there was done under the authority of Bethlehem will not do. We have pointed to the evidence in the record that he was doing exactly what his duties with Bethlehem required him to do; that he was not a loaned servant to

Western Drilling Company and that there is no reasonable basis for that court's statement that Brieth's act could have been an idle one and personal and meddling and in no way connected with, but outside the scope of his duties and authority. The mere statement of the Honorable Chief Justice of the United States Court of Appeals for the Fifth Circuit to the contrary, we emphasize, has no support in this record. We suggest that the law being what it is, and so well established, that had not the United States Court of Appeals injected into this record by surmise and speculation this theory that it could not possibly have affirmed the judgment of the trial court. The failure of the court to sustain this Specification was reversible error and has resulted in an injustice to Mr. Mobley which only this Court now can correct.

SPECIFICATION OF ERROR III—(Restated)

This Honorable Court erred in overruling Appellants' Specification of Error No. 3, reading as follows:

> **"The error of the Trial Court in giving the jury the following instruction:**
>
> > **" 'You are instructed that unless you find from a preponderance of the evidence that defendant's representative Brieth, while acting in the scope of his authority, negligently set in motion the drum of the draw works on the drilling unit involved, while plaintiff was inside the encasement thereof, in a place of danger, your verdict will be for the defendant'."**

Statement under Specification of Error III

That portion of the Court's charge here under question

which is set out immediately above, told the jury that unless they found that the defendant's representative Brieth negligently set in motion the drum of the draw works that they should return a verdict for the defendant. This instruction on the part of the Court was objected to on the ground that it was in conflict with that part of the Court's charge relating to the failure of the defendant to keep a proper lookout and tended to confuse the jury. (R. p. 223.)

The Court in another portion of its charge had instructed the jury to return a verdict for the plaintiff if they found that the defendant's representative, Brieth, failed to keep a proper lookout. (R. p. 217.)

Authorities and Argument

There is no escape from the fact that the Court gave the jury conflicting instructions over objections timely made. The Court charged the jury to find for the plaintiff if it found that defendant's employee failed to keep a proper lookout at the time and on the occasion in question, and further found that such failure was negligence and a proximate cause of plaintiff's injuries and damages. Then the Court in another part of the charge instructed the jury that unless they found from a preponderance of the evidence that Brieth negligently set in motion the drum or the draw works, to find for the defendant; such instruction was in direct conflict with the Court's instruction on the issue of lookout, and if followed eliminated from the consideration of the jury the issue of lookout. Then, too, if the two instructions were considered together they must have confused the jury. There was no way that the jury could

have reconciled the two conflicting instructions. It is reversible error for the trial court to give contradictory instructions.

Supporting our Specification of Error III, we rely upon the case of *Shipley v. Missouri, K. & T. Railway Company of Texas (Supreme Court of Texas), 217 S. W. 137, 139.* In that case the fourth paragraph of the Court's charge authorized the jury to find for the plaintiff on two grounds, to-wit, on the quick and sudden lurch of the train, or on the place and manner and means provided for plaintiff in error's wife to alight from the train. Paragraph 5 of the Court's charge in that case instructed the jury to find for the defendant unless they believed that its servants stopped the train with such lurch and jerk, and "unless they further believed that defendant in error's agent and servants were guilty of negligence in carrying plaintiff in error's wife past the station and having her alight in the place and in the manner and with the means furnished." In that case, as in this case, the charge of the Court was objected to on the ground that the paragraphs referred to were inconsistent and contradictory. In that case the jury returned a verdict for the defendant. The Supreme Court of Texas in reversing the judgment of the Court of Civil Appeals and of the District Court on this point said:

> "(3) Since plaintiff in error was entitled to recover, as recognized in the preceding paragraph of the charge, on a finding of negligence, based either on the quick and sudden lurch of the train or on the place and manner and means provided for plaintiff in error's wife to alight from the train, paragraphs 4 and 5 of the charge are contradictory, and it is impossible to say that the jury did not find a verdict for defendant

in error because the jury failed to find more that the law required to entitle plaintiff in error to recover. Railway Co. v. Dickey, 108 Texas 130, 187 S. W. 184; Railway Co. v. Rodgers, 89 Tex. 675, 36 S. W. 243; Railway Co. v. Sage, 98 Tex. 438, 84 S. W. 814.

"For the error in the Court's charge, the judgments of the Court of Civil Appeals and of the district court are reversed, and the cause is remanded to the district court for a new trial."

We believe this case is exactly in point and controlling. In the present case the Honorable Trial Court instructed the jury that it might return a verdict for the plaintiff on either of two grounds, to-wit, (1) failure of the defendant's agent, servant and employee to keep a proper lookout; and (2) engaging and setting in motion the drilling unit; then, after having so charged the jury, the Court instructed them that "unless" they found from a preponderance of the evidence that the defendant's representative negligently set in motion the drum of the draw works to return a verdict for the defendant. The two instructions in the present case we submit are just as inconsistent and contradictory as the two instructions involved in the case from which we have just quoted. The Supreme Court in that case for that error alone reversed and remanded the case for a new trial. We most earnestly pray this Court to follow the Supreme Court of the State of Texas and grant plaintiff a new trial.

On this point we cite the case of *Galveston, H. & S. A. Ry. Co. v. Sparks, 162 S. W. 943, 945, paragraph 6.* In that case the court said:

"(6) In the first special charge requested by appellee and given by the court, appellant was charged with liability for overloading the cars, if it supervised the loading; then, in the second special charge, the appellant is exempted from liability for overloading the cars, if the contract so provided. There is an apparent conflict between the two charges which should be guarded against on another trial."

In that case the court, in one part of its charge, told the jury that the railroad company was liable for overloading the cars if it supervised the loading; then, in another part, that the railroad company was exempted from liability for overloading the cars if the contract so provided. Now, in the present case, the Court instructed the jury that if it found that Brieth failed to keep a proper lookout at the time and on the occasion in question and that such failure was negligence and a proximate cause of plaintiff's injuries then to return a verdict for the plaintiff. Thereafter, the Court told the jury that "unless" they found that Brieth set the machinery in motion at the time and on the occasion and that such was negligence and a proximate cause of plaintiff's injuries and damages to find for the defendant. We think that the conflict here is just as obvious and plain as was the conflict in the case which we have just cited.

We deem the case of *St. Louis Southwestern Ry. Co. of Texas v. Anderson (Court of Civil Appeals), 124 S. W. 1002*, in point. There the court said:

"* * * Further, the instructions as a whole were conflicting, and quite irreconcilable by the jury. The effect of the instructions, properly read together, was to tell the jury that appellee was not, as a matter of

law, 'bound to exercise ordinary care to discover that said switch was open' but that if he 'would have discovered said open switch by the exercise of that ordinary circumspection which a prudent man would have used in his particular employment', then, as a matter of law, he was bound to exercise ordinary care to discover the open switch. Appellant, in its right, was entitled to a plain affirmative instruction on the issue of contributory negligence, free from conflict or abridgement. A correct special charge, each No. 3 and No. 7, was offered and refused, and complained of in the sixteenth assignment. To have given the special charge, however, would still not have removed, but only made more confusing, the objection urged to the main charge. 'A charge must be viewed from the standpoint of a jury, and considered with reference to the probable effect of the charge as a whole upon the minds of a jury desirous of obeying the instructions of a court.' Tel. Co. v. Motley, 87 Tex. 38, 27 S. W. 52. It is a settled rule that an erroneous charge is presumed to be injurious. Ry. Co. v. Warner, 88 Tex. 648, 32 S. W. 868; Ry. Co. v. Johnson, 91 Tex. 574, 44 S. W. 1067. It is error to give contradictory and irreconcilable charge. Baker v. Ashe, 80 Tex. 356, 16 S. W. 36."

We rely upon the case of *Renfro v. Texas Central Railway Company (Court of Civil Appeals, Austin), 141 S. W. 820.* There the court said:

"This is a personal injury suit, which resulted in a verdict and judgment for the defendant, and the plaintiff has appealed.

"(1) The first assignment of error complains of the action of the trial court in giving a special charge requested by the defendant, by which the jury were instructed to find a verdict for the defendant, if they believed from the evidence that the defendant stopped its train a reasonably sufficient time for the plaintiff to alight therefrom. It is contended, and correctly so,

> that the charge referred to was in conflict with the main charge given by the court, which followed the averments in the plaintiff's petition, and authorized a recovery if the defendant was guilty of negligence in failing to stop the train a reasonably sufficient length of time for the plaintiff to alight in safety, or in not assisting the plaintiff to alight from the train, or in failing to provide a step-box upon which the plaintiff might alight. The court should not have given these conflicting instructions. Baker v. Ashe, 80 Tex. 356, 16 S. W. 36."

In the case from which we have just quoted, the plaintiff relied upon two grounds of recovery: (1) the negligence of the defendant in failing to stop the train a reasonably sufficient time for the plaintiff to alight therefrom in safety, and (2) in not assisting plaintiff to alight from the train and in failing to provide a stepbox upon which plaintiff might alight. Then the court gave a special charge instructing the jury to return a verdict for the defendant if they believed from the evidence that the defendant stopped the train a reasonably sufficient time for the plaintiff to alight therefrom. This action of the court in that case presented a conflict calling for a reversal. In the present case the Court in one part of its charge authorized the jury to return a verdict for the plaintiff on two grounds: (1) negligence of the defendant's agent in failing to keep a proper lookout; and (2) negligence of the defendant's agent in setting the drilling unit in motion. Then, after having done this, the Court instructed the jury that "unless" Brieth set the machinery in motion to return a verdict for the defendant. We respectfully insist that the con-

flict here is as apparent and plain as in the case from which we have just quoted.

The last Texas case which we cite on this point is that of *Texas Midland Railroad Company v. Hooten, 50 S. W. 499.* In this case the court in one part of his charge instructed the jury as follows:

> "If you believe from the evidence before you that the grass in plaintiff's pasture was fired by defendant's locomotive, the law would imply negligence, and the burden of proof is upon the defendant to show its innocent intention."

In another part of the court's charge the jury was instructed as follows:

> "You are charged, before plaintiff can recover for damage done his pasture land and grass by defendant by burning, that plaintiff must prove that the defendant, through its agents, set fire to the grass and burned it, and that the defendant negligently set said grass on fire. It is not sufficient for plaintiff to prove that the grass was fired by defendant, but must further prove it was negligently set on fire."

On appeal the point was made that the two instructions hereinabove set out were conflicting and required a reversal of the case. The appellate court sustained that contention, saying:

> "It will be readily perceived that these instructions are manifestly and directly in conflict with each other. The one requested by the plaintiff announced one proposition of law, while the one requested by the defendant announces directly the opposite. That almost any judge, in a hurry of a jury trial, may sometimes inadvertently approve inconsistent charges, is not a matter of wonder; but that such an error should occur

> three times in succession in an ordinary damage suit, when it is so obvious and glaring as in this case, is a matter of no little astonishment. These charges are so manifestly antagonistic as to render it clear that they nullified and neutralized each other, and left the jury without any rules of law by which to determine the rights of the parties; and for this reason the judgment must be reversed."

We submit that in the present case that the Court's charge here in question nullified and neutralized that part of the Court's charge on the issue of "lookout" and that the two instructions are so manifestly antagonistic as to leave the jury without any rule by which to determine the rights of the parties.

This ground in our motion for a new trial is not only supported by the law of Texas, the law which governs this case, but from our research appears to be the law followed by the Federal Courts. We shall not burden the Court with citing Federal cases as this question is, under the authority of the case of *Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 Supreme Court 817, 82 L. Ed. 1188,* tested by the law of the State of Texas.

SPECIFICATION OF ERROR IV—(Restated)

This Honorable Court erred in overruling Appellants' Specification of Error No. 4, reading as follows:

> **"The error of the Trial Court in holding that there was any evidence of probative force to support a verdict for defendant."**

SPECIFICATION OF ERROR V—(Restated)

This Honorable Court erred in overruling Appellants' Specification of Error No. 5, reading as follows:

"The error of the Trial Court in failing to set the verdict of the jury aside on the ground that it was against the great weight and preponderance of the evidence and so opposed to substantial justice and so shocking to good conscience that the Court ought not to permit it to stand."

Statement under Specifications of Error IV and V

Since Specifications of Error IV and V are related we have grouped them.

There are many things in this case which are undisputed. The plaintiff at the time of his injury was thirty-two years old and employed, making between eighty-five and ninety-five dollars per week. Mr. Mobley had been earning that for several years; he was an experienced oil field worker; he had prospects of a job that would pay him from a hundred and fifty to two hundred dollars per week. (R. pp. 70-71.) Dr. C. C. Nash, a qualified neurosurgeon who had treated Mr. Mobley, testified that the plaintiff was totally and permanently disabled. (R. pp. 95-102.) The defendant in open court stated in the presence of the court and jury that they made no issue of the nature or extent of plaintiff's injuries. (R. p. 99.) Dr. Floyd S. Franklin also testified that Mr. Mobley was totally and permanently disabled. (R. pp. 101-110.)

It was admitted in this case that the only way to engage the low-gear clutch so as to move the machinery where Mr. Mobley was at the time he was injured, was by means of pushing on a pedal with the foot and thus engage what was known as the low-gear clutch. In this connection see record page 147, lower part thereof, and also page 148.

That is what defendant's expert testified. This witness also testified that at the time the clutch was engaged that he was the only person close to it. (R. p. 148; also, R. p. 188.) This witness also testified that there was nothing mechanically wrong with the machine. (R. p. 189.)

There are numerous pictures in the record, pages 82 to 94, and pages 196 to 206, inclusive, which will enable the Court to visualize more clearly the physical aspects of the drilling rig with regard to the operation of the low-gear clutch. Mr. Mobley and Mr. A. W. Williford, who testified in this case, were in complete agreement with what had to be done to make the clutch become engaged. That matter was simply not in dispute, unless it can be said that the statement of Mr. Brieth that he did not engage it raised the issue as to whether or not he did. We do not think that a mere oral assertion of that kind under the admitted physical facts carried with it any probative force as opposed to the other undisputed facts and circumstances.

Authorities and Argument

Under the testimony of Mr. Brieth he must have engaged the clutch; he was the only one near enough to engage it. He and everybody else that testified stated that the others had walked away from the controls; that there was nobody else within twenty feet of the controls that had to be operated to engage the clutch at the time it was engaged and injured the plaintiff. There was nothing mechanically wrong with the rig; the clutch only needed to be lubricated; the reason it needed to be lubricated ac-

cording to all testimony was that it was "hard" to engage. The fact that admittedly the clutch was "hard" to engage and that there was nothing wrong with the machinery compels the conclusion that Mr. Brieth engaged it; there can be no other explanation. His testimony that he did not is so contrary to reason and opposed to natural and physical laws as to carry no probative force on that point. In the case of *Baltimore and O. R. Co. v. O'Neil, 186 Fed. 131*, it is held that testimony contrary to reason and opposed to natural and physical laws cannot support a verdict.

In the case of *Carter v. Kurn, 127 Fed. 2d 415 (C. C. A. Arkansas)*, it was held that oral testimony loses its probative force when contradicted by admitted physical facts. Now in this case the testimony of Mr. Brieth that he did not engage the clutch is contradicted by the admitted physical facts. Those facts in part are: the low-gear clutch would not engage unless someone engaged it by pressing on the low-gear pedal. The clutch was "hard" to engage; there was no one at the controls to engage it except Mr. Brieth. Anyone else that could have engaged it was at least twenty feet away. Mr. Brieth testified in regard to this; there was no controversy that there was no mechanical defect in the machinery before the time of plaintiff's injury and after. Mr. Brieth testified that this was true; that he was an expert and knew this from observation and examination of the machinery both before and after the plaintiff was hurt. We therefore say that his oral testimony that he did not engage the clutch loses its probative force on that point by reason of the fact that it is contradicted by the physical facts disclosed by this record.

In the case of *Galloway v. United States, 130 Fed. 2d 457*, which was affirmed by the United States Supreme Court, it was held that where evidence presented is positively contradicted by the physical facts neither court nor jury is permitted to give it credence. Mr. Brieth's testimony that he did not engage the clutch, is contradicted by the physical facts testified to by him, the admitted physical facts, and the testimony of other witnesses. The testimony, that he did not engage the clutch is without probative force.

Since Mr. Brieth must have engaged the clutch and did so at a time when according to the undisputed evidence he knew that the plaintiff was within the draw works, where he had been instructed to go, he was guilty of negligence as a matter of law; and, under such state of facts, where admittedly a young man with a large earning capacity for a workman was totally and permanently disabled from ever working again, the verdict of the jury in favor of the defendant in this case is so shocking and opposed to substantial justice that it ought not be permitted to stand. On this ground alone the lower court should have granted our motion for a new trial and set the verdict aside and granted plaintiff a new trial.

We recognize the rule that the granting of a new trial because of mere insufficiency of evidence is ordinarily within the sound discretion of the trial court. However, we say that such discretion on the part of the trial judge is subject to review by this Court. As to there being no evidence of any probative force to support the verdict of the

jury we think as a matter of law that the trial court was without discretion in that respect, and should have granted a new trial.

We respectfully submit that our Specifications of Error IV and V ought to be sustained.

SPECIFICATION OF ERROR VI—(Restated)

This Honorable Court erred in overruling Appellant's Specification of Error No. 6, reading as follows:

> **"The error of the Trial Court in submitting to the jury the issue of unavoidable accident."**

Statement under Specification of Error VI

The Court in this case instructed the jury that if they believed that Mr. Mobley's injuries were the result of an unavoidable accident to return a verdict for the defendant. (R. p. 216.) The submission of the issue of unavoidable accident was excepted to. (R. p. 225.)

The error of the Court in submitting the issue of unavoidable accident in this case was such flagrant error that this Court ought to take cognizance of it even in the absence of any objection to the submission of the issue. There was no evidence that something extraneous was responsible for the low-gear clutch becoming engaged and injuring Mr. Mobley. That issue was not even raised by any evidence and the authorities which we cited under our Specifications of Error I and II, are applicable here.

STATUTE OF LIMITATION

The trial court correctly held that the cause of action of Petitioners was not barred by the Statute of Limitations.

The United States Court of Appeals did not pass on this question which was raised by Respondent but we submit that the trial court correctly decided that question.

The plaintiff was injured on January 31, 1946. He did not file suit until July 8, 1948. On July 28, 1948, Associated Indemnity Corporation filed its plea of intervention. (R. p. 12.) At the time plaintiff was injured his employer, Western Drilling Company, carried a workmen's compensation policy covering its employees. This policy was carried by the intervenor in this case. The intervenor began the payment of weekly compensation to the plaintiff on or about February 14, 1946. (R. p. 32.) These payments of compensation were continued from week to week as shown by the bill of particulars. (R. pp. 31-32.)

In June, 1948, the intervenor agreed with the plaintiff that he might file this suit and that it would be subrogated to which it had paid out, as provided by the law of subrogation under the Texas Workmen's Compensation Act. (R. pp. 15, 16, 17.) Plaintiff in April, 1946, filed his claim for compensation with the Industrial Accident Board of the State of Texas, which was pending and undisposed of before that Board at the time he made his agreement with the intervenor that he might file this suit. (R. p. 16.) Exhibit A to plaintiff's original petition shows that intervenor incurred heavy medical and hospital bills, well within the two-year period back of July 8, 1948. (R. pp. 9-10; also R. p. 162.)

In other words, at the time of the filing of plaintiff's suit and at the time of the intervenor filing its plea as-

serting its subrogation rights and down to and including the trial of this case the liability of the intervenor had not been determined. The voluntary payment of compensation by the intervenor from week to week did not determine its liability to plaintiff. Not until the plaintiff and intervenor had agreed as to the extent and duration of his injuries or until there had been a judicial determination thereof could it be known what intervenor's liability was.

The above statement we deem sufficient for a discussion of the question of limitation.

Authorities and Argument

The case of *Fidelity Union Casualty Company, et al. v. Texas Power & Light Company, 35 S. W. 2d pages 782, 784*, supports the trial court on this point. In that case where suit was filed against a third party after the expiration of two years from the date of injury, the two-year statute of limitations of the State of Texas was pleaded in defense thereto. In that case the court said:

> "On the above authorities we hold that, in any event, the statute of limitations was suspended from the day Riley filed his claim with the Industrial Accident Board to the date of the entry of the judgment in that case, March 22, 1930, and this suspension is fatal to appellee's claim of limitation.
>
> "We therefore conclude that the court erred in holding that this suit was barred by the statute of limitation, and reverse and remand the cause for a trial on its merits not inconsistent with the views herein expressed.
>
> "Reversed and remanded."

The Supreme Court of the State of Texas refused a writ of error in that case. When the Supreme Court of this State refuses a writ of error that means that it agrees not only to the conclusion reached by the Court of Civil Appeals, but that it approves what the Court of Civil Appeals said in its opinion. In the present case it was not controverted that when Mobley filed this suit that long prior thereto, to-wit, April 30, 1946, he had filed his claim for compensation with the Industrial Accident Board. This being true, under the holding of the case from which we have just quoted, the statute of limitation was suspended and the trial court correctly overruled defendant's motion for an instructed verdict and its various pretrial motions voicing the contention that this case was barred by the Texas statute of limitations.

The case of *Texas Employers' Insurance Association v. Texas & Pacific Railway Company, 129 S. W. 2d pages 746, 752,* does not support the contention of the defendant. In that case the court said:

> "The statute (Art. 8307, section 6a, R. S. 1925) makes the insurance carrier an agent or trustee for the injured employee or beneficiary to bring and maintain the action against the negligent third party. The insurance carrier cannot maintain the action either for itself, or in its trust capacity for the employee or beneficiary, until the amount of its liability for workmen's compensation 'has been paid or assumed.' This is so because otherwise there could be no apportionment of the cause of action or amount of recovery thereon as between the insurance carrier in its own right and that of the injured employee or beneficiary represented by it as trustee. In fact, the very existence of any cause of action in the injured employee, or his

beneficiary, may, under easily conceivable circumstances, be wholly contingent upon the amount of compensation paid or assumed by the insurance carrier. Mitchell, et ux. v. Dillingham, Tex. Civ. App., 22 S. W. 2d 971. Take a situation, for instance, where the undisputed facts of the injury and damages showed an amount recoverable less than the compensation paid or assumed. In such cases, there never existed any cause of action against the third person in favor of the employee or beneficiary. Plainly, we think, limitation could not begin to run against either the insurance carrier on the one hand, or the employee or beneficiary on the other, until the fact of the amount of payment or assumption of the payment of compensation existed."

Now in this case the amount of intervenor's liability for workmen's compensation had not been paid or determined more than two years before this suit was filed and thus under the authority of this case upon which the defendant seems to principally rely, it is seen that the trial court correctly overruled defendant's contention that this case was barred by the statute of limitations.

The defendant in this case fails to recognize that the amount of compensation that intervenor had to pay had to be determined either by agreement or judicial determination before the statute of limitations would begin to run. We repeat that the case of *Texas Employers' Insurance Association v. Texas & Pacific Railway Company, 129 S. W. 2d pages 746, 752*, supports our counter point rather than the defendant's specification of error.

The defendant also quotes from the case of *Texas Employers' Insurance Association v. Brandon, 89 S. W. 2d*

page 892. In that case the court will note that the expression "paid or assumed to pay." In the light of other Texas cases carries with it the meaning of a determined amount and has no reference to mere weekly payments of compensation of a claim that has been duly filed and is still pending before the Industrial Accident Board.

In this case it was undisputed that when plaintiff obtained intervenor's consent to file this suit in June, 1948, that more than two years had already elapsed since intervenor had made its initial payment of weekly compensation. If the plaintiff before the expiration of that time had filed this suit then under the holding of the Supreme Court of Texas in the case of *Texas Employers' Insurance Association v. Brandon, 89 S. W. 2d page 982,* he would have forfeited his right to any further compensation in the event of an unsuccessful effort to obtain judgment against the defendant. That fact is not only set out in the *Brandon case* but by other cases cited herein.

Now in this case the plaintiff did obtain the consent of the insurance carrier to file and prosecute this suit without waiting until all the compensation that plaintiff thought was due him had been paid by the intervenor. This he had a right to do, as is shown by the case of *Otis Elevator Company v. Allen, et al., 185 S. W. 2d page 117, paragraph 2,* of the court's opinion.

The holding of the Court of Civil Appeals on this point was approved by the Supreme Court of Texas in the same case, *Otis Elevator Company v. Allen, et al., 187 S. W. 2d page 657.*

The defendant in its brief cites numerous cases on this point. The law is so well established contrary to defendant's contention that we do not take up each case cited. In fact many of the cases cited do not bear upon the point here involved. If there were any lack of agreement as to the Texas law on this point among the courts of this state, which there is not, then this Court would under the authority of *Nelson v. Westland Oil Company, 181 Federal 2d 371, 375 (Circuit Court of Appeals)*, accept the Federal District Judge's views as to the local law of the case.

CONCLUSION

For the reasons stated in the Petition and in this brief, Petitioners urge that a writ of certiorari be issued in order that the questions presented in the foregoing petition may be reviewed by this Court. The decision of the United States Court of Appeals for the Fifth Circuit violates the well settled local law as well as the Federal decisions on the questions here presented. In particular it, under the facts in this case, extends the theory of loaned servant to a length never heretofore envisioned. That question alone is of such import and importance as to cause this Court to review this case. The Lent Servant Doctrine is one of importance in both State and Federal jurisprudence. To charge, as the trial court did in this case on that question under the state of this record and for the United States Court of Appeals for the Fifth Circuit to approve such a charge, we repeat, extends the Lent Servant Doctrine beyond all reasonable bounds and conflicts with every

case that we have examined where that theory was involved.

It is not right that Mr. Mobley, who was admittedly totally and permanently disabled for life and incapable of doing anything for profit should have his rights to damages cut off by the erroneous instructions given by the trial court in this case. The United States Court of Appeals in our opinion should have reversed and remanded this case for a new trial to the end that justice might be done. And so Petitioners respectfully pray that this Court issue its writ of certiorari to the end that the judgment of the trial court and that of the United States Court of Appeals may be reversed, and they further pray for general relief.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1950.

No. _____

LEON MOBLEY AND ASSOCIATED INDEMNITY CORPORATION, *Petitioners,*

vs.

BETHLEHEM SUPPLY COMPANY, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI.*

Respondent desires to file this brief in opposition to the Petition for a Writ of Certiorari by means of which the decision of the Court of Appeals for the Fifth Circuit would be reviewed. The purpose of this brief is to expose the absolute lack of merit to petitioners' application to be the beneficiary of the court's discretion.

Respondent states:

POINT I: *The statements of fact in the petition and brief, in most instances, are not accurately stated and tend to give the court a warped view of the evidence considered by the jury and in the record before the Court of Appeals.*

POINT II: *The issues involved in the case are not of the gravity and public importance that justify the court to*

exercise the carefully limited discretionary power to grant writs of certiorari.

POINT III: *The specifications of error of law charged against the Court of Appeals are without basis.*

I.

The statements of fact in the petition and brief, in most instances, are not accurately stated and tend to give the court a warped view of the evidence considered by the jury and in the record before the Court of Appeals.

The court may well wonder upon the initial consideration of petitioner's petition and brief how the jury came to a verdict against petitioner, and more so, how a competent trial judge and an experienced Court of Appeals gave approval thereto. The bare recital of the evidence by petitioner gives the impression that a grave injustice has been done in a case of great public importance, when no such thing is true.

Petitioner was employed by Western Drilling Company, hereafter called Western, as a derrick floorman. Western was erecting and putting into operation, for the first time, a new drilling rig purchased of respondent. On the day involved, petitioner came on duty at 4:00 P. M. At that time the persons present were: (*1*) The day crew whose tour of duty had ended, none of whom were present when respondent was injured at 4:15, and none of whom are identified except the driller whose name was Bob; (*2*) Mr. Brieth, a sales engineer representative of Bethlehem; (*3*) Mr. Henderson, one of the owners of Western; (*4*) petitioner and the other members of his crew, who will be identified in the subsequent recital of the evidence, and (*5*) a Mr. McCain, an independent contractor, who was under

the derrick floor and whose presence was unkown to most of the witnesses.

The driller, Bob, and the driller on petitioner's shift, Mr. Williford, had a conference and informed Mr. Brieth that the low clutch on the drum was hard to engage, and Mr. Brieth suggested greasing the mechanism that operated the clutch.

Mr. Brieth was there as the representative of respondent (R. 147) "to give whatever advice or help in the way of seeing that the machinery gets started properly." He had gone there at the direction of his immediate superior, and under the orders of respondent, by whom he was paid. He (R. 168) "gave whatever advice was possible to the men that were rigging up this equipment, as to the proper location of the transmission half of the drawworks, half of the drawworks, and assisted them in lining up the center of the wheel with the center of the drawworks, showing them the center line of the drawworks so their truck drivers and so forth could properly align it, and instructed the drillers in the mechanical motions of the gear shifts, levers, and so forth."

Q. "Your attention was directed towards the machinery which was a product of your employer manufacturer?

A. Yes, sir.

Q. And to explain such things as might be information requested from one who had by study become familiar with that operation?

A. Yes, sir."

He said (R. 171):

Q. "Who did that operation and spotted that fitting?

A. Mr. Williford. I do not do any mechanical operation on any rig, or did not at the time I was employed."

He gave answers to the following questions (R. 192):

Q. "And you, as an expert, had gone out there to show them how to put it up and put it into operations properly, that is what you were doing, isn't it?

A. Yes, sir.

Q. And whatever was necessary to that end you did, didn't you?

A. As long as it was advice or constructional nature, yes, sir.

Q. Are you trying to claim you didn't have any right to touch anything around there; is that what you are trying to tell this jury?

A. Not necessarily, sir.

Q. All right, you had a right to test that machine out, didn't you, as an expert?

A. Yes, sir.

Q. And you did it, didn't you?

A. No, sir, I don't believe I could say truthfully that I did.

Q. Didn't you tell the jury here on direct examination that you had been jiggling that stuff before Mr. Mobley went in the drawworks to grease this thing?

A. The drillers and myself had checked the low jaw clutch lever, yes, sir, but not testing the rig.

Q. You said you did it?

A. Yes, sir."

We have set out this evidence, which is all of the evidence in the record on the point of his authority and his acts in operating the controls, to offset certain unwarranted statements of fact in petitioner's petition and brief, and to give this court a complete picture on those matters.

The drum or spool on which the wire drilling line was wound and unwound was covered by a partly rounded metal

covering, and in the upper front aspect thereof there was a rectangular opening about 18 to 24 inches from top to bottom and about 5 feet across (R. 200). The wire drilling line passed through this as it was let out or wound onto the spool. As one stood on the derrick floor facing this drum cover, one could observe another much smaller opening, covered by a movable plate, to the left of the larger opening called the inspection plate (R. 200), and to the left of the drum cover was the driller's position at the controls (R. 200).

The controls consisted of (*1*) three foot-operated pedals standing about 4 inches above the floor, extending in a row vertically to the drum cover, (*2*) a large brake lever about 40 inches long, which arose from the floor and customarily stood above the pedals at an angle of about 45 degrees, on which the driller (when in position) rested his right hand, and (*3*) a master clutch to the driller's left, about shoulder high, on which the driller (when in position) rested his left hand. The engines that furnished the power were running but, with the master clutch disengaged (the driller disengages it by pulling it outward or toward him and engages it gradually, like the clutch of an automobile, by pushing it inward) were idling. In order for anyone to engage the engines with the drilling works two distinct operations with the controls, in proper order, were needed: The low drum clutch must be engaged by pressing down the proper foot pedal and then the master clutch must be engaged, as above indicated. As one faced the drum cover, the driller's position was to the left of the controls or, in effect, the controls (especially the brake lever) were between the driller and the drum cover. (R. 84)

Mr. Williford, the driller, Mr. Brieth and Mr. Mobley

stood facing the drum cover, from left to right in the order named, when Mr. Brieth suggested greasing the low drum clutch sliding member. On the left end of the drum or spool is a brake flange several inches high (R. 197), and to the left of the flange near the end of the shaft of the spool was the grease connection or nipple through which the grease was to be applied (R. 203). Mr. Williford gave the order to Mr. Mobley to apply grease, first assuming the driller's position and engaging the power to turn the drum and spot the nipple for convenience, and left the scene to do work at another place on the derrick floor. Mr. Williford was the last person to touch the controls before Mr. Mobley was hurt. Mr. Williford testified he disengaged the power after spotting the nipple. Mr. Mobley warned the other two men to not touch the controls while he was inside the drum cover. Mr. Mobley went through the big opening in the drum cover, sat astride the spool (R. 82), faced left, reached over the brake flange to connect the grease gun to the nipple (which he could not see because of the brake flange), and made two strokes of the grease gun. Immediately, the drilling works began to operate and the drum to revolve, the result of which was to inflict injury upon Mr. Mobley.

Mr. Brieth testified, and demonstrated by photos taken in connection with his deposition later (R. 205-206), how he stepped upon the ledge or base of the drum cover and watched Mr. Mobley attach his grease gun and apply the grease. Mr. Brieth was peering through the inspection plate hole and could see no part of Mr. Mobley's body except his hands.

Mr. Mobley filed his common law action against Bethlehem as the master of Mr. Brieth, as is authorized by the

Texas law, to recover damages for his injuries, although he was entitled to and had received compensation from his employer through an insurance carrier by virtue of the Workmen's Compensation Law of Texas. He alleged that Mr. Brieth got into the driller's position and manipulated the controls, thus engaging the power and caused his injury. Mr. Brieth positively denied this allegation.

On the derrick floor at 4:15 P. M., the time of the accident, besides Mr. Brieth, were Mr. Henderson, Mr. Mobley's employer, and four of his crew members. Mr. Henderson did not testify at the trial, neither did Patterson, a crew member. The driller and two crew members (one a brother-in-law of Mr. Mobley) testified and each denied seeing Mr. Brieth manipulate the controls prior to Mr. Mobley's injury. (R. 124, Mr. Williford; R. 130, Mr. Sisson; R. 143-144, Mr. Maxey.) Mr. Mobley testified he could not see Mr. Brieth after he went inside the drum cover and did not hear any movement until the machinery started, and he did not know who engaged the low gear clutch (R. 62).

Therefore, plaintiff offered no eye witness to Mr. Brieth's alleged act.

Plaintiff offered the testimony of Mr. McCain, the man under the derrick floor, and Mr. Williford, the driller, to the effect that immediately after the accident Mr. Brieth stated to each of them separately that he did manipulate the controls and engage the power and cause Mr. Mobley's injury. Mr. Brieth denied making these statemnts.

Respondent used Mr. Brieth as its only witness, and we have outlined the effect of his testimony above which was a complete and positive denial of the acts and statements charged to him.

The jury returned a verdict for respondent, concurred in by all members.

Petitioner's statement on page 3 of his petition, "* * * defendant's employee, Brieth, engaged the clutch which resulted in plaintiff receiving injuries * * *" is not correct, was not supported by any direct evidence at the trial and the circumstantial evidence in the nature of confessions offered to prove the allegation was disbelieved by the jury. Therefore, petitioner is not at all warranted to make such a statement.

In another respect, petitioner is not correctly stating the record to the court in his petition or in his brief. In the summary statement of matters involved and in the argument in support of Specification of Error No. 1, petitioner repeatedly says there was no evidence of a mechanical defect in the drilling rig or unit. This is based entirely on the testimony of Mr. Brieth (R. 189), in answer to misleading questions relating to his deposition, to the effect that "there was nothing mechanically wrong with the machine." Reference to R. 148, where petitioner introduced in evidence certain portions of Mr. Brieth's deposition, will show that Mr. Brieth really said, in answer to a question as to whether anything was mechanically wrong with the machine: "The only thing we could find was the low clutch was hard to operate, and mechanically—the mechanical operation of it wasn't faulty. It was all right. But that was hard to operate." All of the witnesses who testified on the subject said the low drum clutch was hard to operate for some unknown reason, and Mr. Brieth's suggestion that it be greased was an experimental step designed to hunt the reason for this. When it is then considered that the machinery started operating without any stated cause the plaintiff could prove, the jury may have believed there was

a mechanical defect unknown to anyone or for a lack of grease. It is not proper for petitioner to say, on pages 9, 15, 18 and 19, that there was no evidence on this point, or that it was undisputed in his favor, or that the undisputed evidence was that there was no defect. Respondent is by this means trying to make a distinction between a "mechanical defect" and the "clutch not functioning properly." The two statements mean the same thing to us and to the jury. Respondent says on page 23 that undisputed evidence shows the clutch was not functioning properly. Yet elsewhere it is insisted that the undisputed evidence showed "no mechanical defect."

Petitioner is subject to the same criticism on another fact issue. Petitioner says, on pages 9, 20, 21 and twice on page 23, that Mr. Brieth was sent by Bethlehem to manipulate these controls, or that the undisputed evidence is that he had such authority, or that there was no evidence to the contrary, and in particular, "We have pointed to the testimony in the record that what Bethlehem had Brieth employed to do was to manipulate and operate the draw works among other things, test it so to speak, to the end that it would be set up so as to operate properly," and "The undisputed record shows that the clutch was not functioning properly (we interrupt here to point out that earlier petitioner has been asserting that the undisputed evidence was to the contrary) and Brieth himself was attempting to correct this thing; that was certainly not mere personal curiosity on his part but was for the purpose of carrying out the business of the defendant and in the discharge of his duty to his employer." The bold assertions that he had authority, or was sent to manipulate the controls, etc., are not justified by the evidence. Here is Mr. Brieth's testimony: (R. 147): "* * * as is the custom in the oil field, a

machinery man from the vendor usually goes out to give whatever advice or help in the way of seeing that the machinery gets started properly"; and again, R. 169, "As was the custom of the vendors a person in connection with the company, in the mechanical department, was sent out in an advisory capacity or assistance possible in the erection of new equipment"; and again, R. 168:

Q. "What work did you do, if any, in the interval between the day you first went out until January 31st?

A. I gave whatever advice was possible to the men that were rigging up this equipment, as to the proper location of the transmission half of the drawworks, half of the drawworks, and assisted them in lining up the center of the wheel with the center of the drawworks, showing them the center line of the drawworks so their truck drivers and so forth could properly align it, and instructed the drillers in the mechanical motions of the gear shifts, levers, and so forth.

Q. Your attention was directed towards the machinery which was a product of your employer manufacturer?

A. Yes, sir.

Q. And to explain such things as might be information requested from one who had by study become familiar with that operation?

A. Yes, sir,"

and again, R. 169 and 170,

A. "Low jaw clutch was hard to depress. I suggested we go up and look at it. We did. And the daylight driller made a funny remark, that if Williford had not been so slight he wouldn't have had any trouble pushing it down, in fact he never had any

trouble with it, he was a big man. We did jiggle this clutch and tried to engage it, and it was hard.

Q. During the jiggling who was present?

A. The two drillers and myself.

* * * * * * * *

Q. You mean the two drillers were there and you did manipulate or jiggle, as you call it, this low gear clutch to see if anything could be done about it, is that right?

A. Yes, sir";

and again, R. 171,

Q. "Who did that operation and spotted that fitting?

A. Mr. Williford. I do not do any mechanical operation on any rig, or did not at the time I was employed";

and again, R. 192,

Q. "And you, as an expert, had gone out there to show them how to put it up and put it into operation properly, and that is what you were doing, isn't it?

A. Yes, sir.

Q. And whatever was necessary to that end you did, didn't you?

A. As long as it was advice or constructional nature, yes, sir.

Q. Are you trying to claim you didn't have any right to touch anything around there; is that what you are trying to tell this jury?

A. Not necessarily, sir."

We think from this evidence the jury could determine the extent of Mr. Brieth's authority duties, and the petitioner's assertions regarding its unqualified support of his position is wholly unjustified.

We have labored this point to the detail before ex-

hibited because we fear the effects of a first impression gathered from a distorted presentation. We assume that the court has had more than a little experience in actual presentation falling far short of expectation aroused by promised presentation.

II.

The issues involved in the case are not of the gravity and public importance that justify the court to exercise the carefully limited discretionary power to grant writs of *certiorari*.

The preceding remarks lead directly into a discussion of our second proposition. We were about to begin our discussion of this proposition by saying that this case is an average negligence case that might arise anywhere. However, we do not wish to accord it the high status of average. In the average case, the plaintiff will have some evidence to support his allegations of negligence charged to the defendant. Not so, this plaintiff.

Mr. Mobley had no eye witness to say that Mr. Brieth got into the driller's postion and manipulated the controls so as to engage the power and set the draw works in motion. He wished the jury to believe that (*1*) because the machinery would not become engaged and receive power and operate except through the direct act of some human, and (*2*) because Mr. Brieth was the human nearest the controls when the machinery set in operation, Mr. Brieth must be the one who engaged the power. That is all there is to plaintiff's lawsuit, except the unbelievable testimony of two witnesses that Mr. Brieth admitted to them he started the machinery. Really, the petitioner can have no just complaint because a jury would not give him a verdict on such evidence.

The issues of law were those that arise in hundreds of tort actions in Texas. Petitioner saw no great, or important, issues as is evidenced by the fact he requested no instructions to be given to define his position.

Perhaps the most distressing thing about this case is that prior to its belated filing, petitioner suffered grievous injuries. This makes the case of transcendent importance to him. But, without in anywise trying to minimize that aspect of the matter, courts deal with such matters daily, and the Honorable Courts below accorded to petitioner every lawful right and opportunity to make the best of a very weak case on the facts. Respondent was not at all to blame for petitioner's injuries. Respondent made no other defense of fact than that. The issue of liability or non-liability on evidence was for the jury. But, to go further and say that the issues were of such importance that this court should review the judgments of the lower courts as a point of importance to the public is not justified.

We will not burden the court with the citation of its decisions respecting its power to grant writs of certiorari nor of the discretion which rests in it with respect to granting such writs and other general pronouncements relating thereto. We will content ourselves with one citation which involves the discretion of granting or refusing such a writ to a Court of Appeals with respect to a decision involving local law issues arising in a negligence action between a servant and master. We call attention to *In re Woods*, 143 U. S. 202. In general, the court said there that the discretion vested in the Supreme Court of the United States to review decisions of Courts of Appeal by certiorari will only be exercised in matters of gravity and general importance. The court said further that issues of local

law, arising from the dismissal of an action by the servant against his master, is not of a character to call for the exercise of such discretion.

That is the rule which we think is applicable in this instance and we cite it for the purpose of authority in opposition to the exercise of the discretion in favor of petitioner in this instance.

III.

The specifications of error of law charged against the Court of Appeals are without basis.

We next desire to direct your attention briefly to the specifications of error and the arguments thereon contained in the brief in support of the petition for writ of certiorari.

Specification of Error No. 1 is as follows:

> "The error of the trial court in giving the jury the following instruction:
>
> > 'You are further instructed that if you find and believe from a fair preponderance of the evidence that the plaintiff received his injuries about which he now makes complaint, as a result of some mechanical defect in said drilling unit, or from the lack of grease on any part of said drilling unit, and not from the act of defendant or its plaintiff's injuries, or immediately prior thereto then in such event your verdict should be for the defendant'."

The authorities cited by petitioner in support of this contention are of the most general nature and consideration of the fact situations involved in those cases demonstrates that petitioner has gone no further than mere generalities in this respect.

A consideration of the evidence in the record will disclose that there was probably more direct and positive tes-

timony from the witnesses concerning the malfunctioning of the low drum clutch and the possible need for grease thereon than any other one thing in this record. While petitioner did not make the malfunctioning of this low drum clutch or the lack of grease thereon the basis for a charge of negligence against respondent in the trial court, nevertheless, everything that was done by any of the actors involved in this incident was done because of the malfunctioning of the low drum clutch and the lack of grease.

Petitioner could not base his cause of action in the trial court upon the alleged negligence of respondent in selling his master a drilling rig which would not function properly or which was not greased properly, nor could he base a charge of negligence against respondent on the rule of *res ipsa loquitur*. The evidence in the record will clearly show that this drilling rig had been sold to petitioner's employer some ninety (90) days earlier at a distant point in the State of Texas, had been hauled across the State of Texas by truck and had been stored in the open unused for the greater part of that time. For these reasons, basic elements to a charge of negligence against respondent in any respect of these points was lacking.

Nevertheless, because of the prominence in the course of the trial of the malfunctioning of the low drum clutch and the lack of grease, respondent felt that it was its privilege, both under state procedure and federal court procedure, to have the trial court, in defining the issues in the action, to clearly state to the jury that petitioner was not seeking to and could not recover from respondent because of the malfunctioning of the low drum clutch or the lack of grease. Therefore, respondent requested, and the trial court gave, the instruction complained of in the specification of error. See *Pleasant* v. *Fants*, 22 Wall. 116.

It is significant in considering the argument of petitioner on this point, that no reference is made in the argument to this language in the instruction "* * * or from the lack of grease on any part of said drilling unit, * * *." For some reason which is not clear to us, petitioner assumes that for the court to have given this instruction on the basis of "* * * some mechanical defect in said drilling unit, * * *" was unduly prejudicial to him, whereas the inclusion in the same instruction of a similar statement with respect to the lack of grease was not prejudicial to him. In our view of the matter, they were equal in effect since each was of equal prominence in the minds of all persons connected with the trial of the action. It is to be noticed throughout his brief that petitioner undertakes to contend that there was no evidence in the record of a mechanical defect in the drilling unit but the recital of the evidence by respondent earlier in this brief indicates that such a position was utterly without foundation. The witness, Mr. Brieth, clearly stated: "The only thing we could find wrong was the low clutch was hard to operate, and mechanically—the mechanical operation of it wasn't faulty. It was all right. But that was hard to operate." Petitioner does not argue that this evidence is not sufficient to have raised in the minds of the jurors some question concerning the mechanical state of the drilling rig nor is he willing to admit that the jurors may have concluded that the malfunctioning of this low drum clutch was a mechanical defect but on the contrary, petitioner places an interpretation upon this language that calls for the entire exclusion thereof through a contrary inference. But nowhere does he undertake to say there was no evidence about a lack of grease or the need for applying grease, or what happened as soon as grease was applied.

In the Court of Appeals, respondent analyzed the Texas cases cited, and, in addition, argued to the Court of Appeals on the basis of the decision of *Pleasant* v. *Fants,* 22 Wall. 116, that it was entirely proper for the trial court to have given such instruction for the purpose of precisely pointing out to the jurors what was not involved as a complement to the instructions advising the jurors what was involved. Petitioner does not pay proper respect to the decision of the Court of Appeals on this point when he says that the Court of Appeals "* * * brushed it aside, saying that it was justified and necessary to the end that the court confine the jury's consideration to the complaint made * * *." In our opinion, the trial court gave careful consideration to the propriety of giving such an instruction, and we respectfully urge that the Court of Appeals undoubtedly gave equally grave consideration to the propriety of the act of the trial court in giving such an instruction, and the reasons advanced by the Court of Appeals for approving the giving of such an instruction cannot be characterized as an act of brushing aside petitioner's charge that the giving of such instruction was erroneous.

Complaint is made regarding another ruling of the trial court, under Specification of Error No. 2.

> "The error of the trial court in giving the jury the following instruction:
>
> > 'Further, if you find and believe from a preponderance of the evidence that the operation of the draw works of the drilling unit involved was, at the time the plaintiff claims to have received his injuries, under the sole and exclusive charge of the Western Drilling Company and its representatives, and that defendant's representative Brieth had no authority from the defendant to manipulate

or operate said draw works, then in such events your verdict should be for the defendant'."

It really becomes difficult to answer in any reasonable fashion the arguments which petitioner advances in his brief because of the extreme and unjustified assertions which he continually makes respecting the facts in the record as the basis for his arguments.

We have illustrated heretofore, by quotations from the record, the nature and extent of Mr. Brieth's authority and duties and the manner in which he exercised them on this particular occasion. It can be seen that Mr. Brieth felt that there were limitations on his authority and that he felt that he remained strictly within the limitations placed upon him. In addition to this, the driller, Mr. Williford, testified (R. 125-126) that Mr. Brieth was supposed to have been in charge of the operations on this occasion and he, Mr. Williford, was taking orders from Mr. Brieth and that Mr. Brieth was actually above Mr. Henderson, the proprietor of the drilling company, who was present on the floor. Of course, there was a conflict of the testimony of Mr. Brieth and Mr. Williford in this respect. Respondent had pleaded in the alternatives, as is permissible under Texas procedure, that Mr. Brieth had been loaned by respondent to Western, or Western's employees had passed under the control of respondent by virtue of this custom in the oil fields testified to by Mr. Williford whereby the sales and service representative of the vendor is in complete charge of rigging up operations such as were being performed here, or if neither of these was strictly true, that the servants of respondent and Western were jointly so closely engaged in an endeavor for the mutual benefit of their respecive masters that, by force of law, the servants of each of the masters became the loaned servant of the other.

Therefore, the instruction above given was entirely justified by the evidence and by the contentions made on the part of petitioner with respect to the issue of whether respondent was liable for the acts of Mr. Brieth on this occasion.

The giving of this instruction was further justified in view of Mr. Brieth's testimony concerning the nature and extent of his authority and duties, for, if he had no authority or apparent authority to operate the controls or to manipulate or jiggle except upon request from the employees of Western and then only in the nature of giving advice or instructions, it is clear that respondent would not be liable for his acts in operating the controls or manipulating them or jiggling them for his own personal purposes, absent any request on the part of any employee of Western and in the face of the direct request of Mr. Mobley to stay away from the controls while he, Mr. Mobley, was inside the drum cover. It was entirely proper for the trial court to give this instruction for the purpose of giving the jury the limitations which exist at law upon the authority or apparent authority of an agent in any given situation.

Again we assert that petitioner is not treating the decision of the Court of Appeals with respect when it calls the reasoned judgment of that court on this point "astounding" and wholly without any support in the record.

The separation of these particular instructions from the instructions as a whole and the presentation of them to this court in an isolated fashion as a part of an attack which placed undue emphasis upon petitioner's view of the evidence, might at first blush cause this court to feel that an error had been committed with respect to some local law. But a study of this record as a whole with the

instructions considered as a group will demonstrate that there was no abuse of discretion on the part of the trial judge and that the decision of the Court of Appeals, reviewing the trial judge's discretion in the light of the record presented and the attacks made upon it, is correct.

We now take up Specification of Error No. 3 which is:

> "The error of the trial court in giving the jury the following instruction:
>
> > 'You are instructed that unless you find from a preponderance of the evidence that defendant's representative Brieth, while acting in the scope of his authority, negligently set in motion the drum of the draw works on the drilling unit involved, while plaintiff was inside the encasement thereof, in a place of danger, your verdict will be for the defendant'."

Respondent introduced evidence with respect to two of its charges of negligence, namely, (*1*) that Mr. Brieth negligently set the machinery in motion and (*2*) that Mr. Brieth failed to keep a proper lookout for Mr. Mobley.

The trial court instructed the jury (R. 217) that if it believed from a preponderance of the evidence that respondent's agent failed to keep a proper lookout for petitioner at the time and on the occasion in question, and that such failure was approximate cause of petitioner's injuries, that its verdict should be for petitioner. Since this was one of the grounds of negligence charged, the trial court deemed it proper to give the instruction along the lines indicated despite respondent's objection thereto (R. 225) on the ground that the overwhelming evidence, including Mr. Mobley's own testimony to the same effect, showed that Mr. Brieth actually had Mr. Mobley within his observation at

all of the times involved in this transaction and for this reason, Mr. Brieth could not have been guilty of failing to keep a proper lookout for Mr. Mobley. Likewise, as we pointed out to the Court of Appeals, the simple allegation that Mr. Brieth failed to keep a proper lookout for Mr. Mobley could not of itself have resulted in any injury to Mr. Mobley. Mr. Brieth had to be found guilty of setting the machinery in motion, whether he was keeping a lookout for Mr. Mobley or not, before Mr. Mobley could receive his injuries. Therefore, both phases of petitioner's charges of negligence were before the jury when the court also instructed the jury (R. 216) that if it found from the preponderance of the evidence that Mr. Brieth did engage the clutch and that such act was negligent, and that such act was further the approximate cause of the injuries sustained by petitioner, that its verdict should be for petitioner.

Since petitioner made two allegations of negligence and since the court gave separate instructions to the jury upon each allegation of negligence, it is difficult for us to see where petitioner has any basis for contending that it was confusing to the jury to give both instructions.

We observe (R. 223) that petitioner's counsel, in addressing the court with respect to the objections to the instructions given, states that the giving of the particular instruction under attack, in Specification No. 3, "* * * cuts out of any consideration from the jury the issue of failure to keep a proper lookout on the part of Mr. Brieth, * * *." Viewed in this aspect of the case, it is apparent that petitioner's objection to this instruction goes more to the form than to the substance. If it was petitioner's contention that the trial court should have coupled both allegations of negligence in one instruction, then this court is not being called

upon to do more than govern the trial courts on the form of the instructions given, and this, in turn, would require the trial courts to include every element involved in the instructions to the jury in the same instruction, and perhaps in the same paragraph and the same sentence. This would constantly confront the courts with the question of precedence in the giving of instructions relating to one allegation of negligence as contrasted with another. These are not matters of gravity or public importance.

Specifications of Error 4 and 5, read:

"The error of the trial court in holding that there was any evidence of probative force to support a verdict for defendant."

"The error of the trial court in failing to set the verdict of the jury aside on the ground that it was against the great weight and preponderance of the evidence and so opposed to substantial justice and so shocking to good conscience that the court ought not to permit it to stand."

The complaints urged under these two grounds are so obviously outside the scope of this court's consideration when it is confronted with a petition for a writ of certiorari, that we do not intend to discuss them. We have read the books in vain for a decision of this court saying that it would exercise its discretion to grant a writ of certiorari to bring before it for reversal a verdict of a jury based on conflicting evidence solely because it thought the verdict should have gone the other way. This Honorable Court does not allow that discretion to the Courts of Appeals or to itself. The jurors are the triers of the facts and on a record such as is before this court, there is no semblance of rea-

son for applying to this court for the exercise of such an extraordinary power.

Specification of Error No. 6 reads:

> "The error of the trial court in submitting to the jury the issue of unavoidable accident."

Respondent did not plead that petitioner received his injuries as a result of an unavoidable accident. But the lack of explanation of what set the machinery in operation, plus the conflict between the testimony of the witnesses on other material points, made the question of unavoidable accident proper. In any event, as respondent pointed out to the Court of Appeals, when one of the attorneys for petitioner, in addressing the jury, stated that instructions would undoubtedly be given upon unavoidable accident and made argument with respect thereto, respondent applied, in open court, for permission to amend its answer by interlineation to plead unavoidable accident. This was well within the discretion of the trial judge both by local law and federal procedure and if it should be held to be erroneous as not having been within the issues, then it was invited error on the part of petitioner's counsel and this court should certainly not be called upon to rectify such a trivial and invited error.

Statute of Limitation.

This issue was injected into the case in respondent's answer. According to the peculiar provisions of the Texas procedure, respondent was directed by the trial judge before the introduction of evidence, to make no reference to the fact that this was a compensation case in its origin, or that insurance was involved (although the insurance car-

rier for Mr. Mobley's employer was actually a party to the action) and, thereafter, the trial court declined to receive evidence touching the issue of statute of limitations and refused to instruct the jury thereon at respondent's request. Respondent cross appealed to the Court of Appeals on this point and the Court of Appeals, acting in conformity with its rule to not consider matters raised by cross appeals unless it had determined to reverse on the merits of the direct appeal, said that because no error prejudicial to the petitioner had been shown and because of the vigorously opposed contentions as to the local law on this question, no effort had been made to determine whether petitioner or respondent was correct on that point. We make this observation with respect to this issue in order that the court may understand how it appears in the case.

Conclusion.

This brief is not on the merits but is designed to show why it is not proper to grant the order of review. The basic charge of negligence leveled against respondent in this case was of such gravity that a jury that would convict Mr. Brieth of having set this machinery in motion, knowing as he did where Mr. Mobley was, would have also found him guilty of the criminal charge of mayhem. Petitioner asserts that because Mr. Brieth was the person nearest the controls at the time the machinery began operating, and because the machinery would not have started without the intervention of some human agency, that Mr. Brieth's direct and positive statements that he did not operate the controls and thus set the machinery in operation, were so

inherently improbable and unbelievable as to make the jury's verdict contrary to reason. We assert with a great deal more emphasis that for the jury to have believed that Mr. Brieth did operate the controls and set this machinery in operation under the given facts and circumstances would have been far more unreasonable and improbable. This law suit was filed after the statute of limitation had run against it. It was based upon charges of the gravest acts of negligence imaginable. Petitioner failed utterly to produce an eye witness to the incident. The jury refused to believe the two witnesses who testified that Mr. Brieth confessed to them that he was responsible for Mr. Mobley's injuries. Other reasons were advanced before the jury for the engaging of the machinery and its setting in motion which were equally or more probable than the charge that Mr. Brieth deliberately operated the controls. Mr. Williford, the driller, who testified to Mr. Brieth's confession of responsibility, was the last admitted operator of the controls. He had a personal interest in excusing himself of any blame and of attaching it to someone else. Another fact to be considered is that the machinery was not operating because of the malfunctioning of the low drum clutch for a lack of grease. As testified by Mr. Mobley, and corroborated by Mr. Brieth, the instant grease was applied to this machinery it set in operation. Therefore, the jury was fully justified in finding that Mr. Brieth did not set the machinery in motion and in believing that the machinery was set in motion from other causes equally or more probable than Mr. Brieth's act.

It is respectfully suggested that there is no merit to the petition for writ of certiorari and that the case pre-

sented does not fall within known rule that calls for the affirmative exercise of the court's discretion, and the petition should be denied.

Respectfully submitted,

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